IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING
[Chapter VIII, Rule 32(2) (b)]
Description of case

Criminal Appeal No. 439 of 2001 **Decided on: June 08, 2006**

A.F.R. (Approved for Reporting)
Not approved for Reporting

Date. 08.06.2006

(Initial of Judges)

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judges for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 439 of 2001
(Old No. 2671 of 1982)

1. Mohd. Asif S/o Mohd. Abez
R/o Ward No. 1, Khatima,
Police Station Khatima, Distt. Nainital.

2. Iqbal Ahmad (Since deceased)
S/o Noor Ahmad Kurasi
R/o Ward No. 1, Khatima,
Police Station Khatima, District Nainital.

…… Appellants

Versus

The State ……. Respondent

Mrs. Pushpa Joshi, Advocate for the appellant.
Mr. D.K. Sharma, Government Advocate with Mr. H.C. Pandey, Asstt. Government Advocate for the respondent State.

Coram: **Hon'ble Rajeev Gupta, C.J.**
Hon'ble Prafulla C. Pant, J.

Dated: June 08, 2006.

[Per Hon'ble Prafulla C. Pant, J.]

This appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.), is directed against the judgment and order dated 08.10.1982, passed in Session trial No. 162 of 1981, by the then, learned Sessions Judge, Nainital, whereby Mohd. Asif (appellant No. 1) was convicted under Section 302 of the Indian Penal Code, 1980 (hereinafter referred as I.P.C.) and Iqbal Ahmad (appellant No. 2) was convicted under Section 302 read with Section 34 of the I.P.C., and each one of them has been sentenced to imprisonment for life.

2) Prosecution story in brief is that on 15.02.1981, Mohd. Saeed (deceased) along with his friend Shakeel (P.W. 3) was watching night show of movie '*Aakhiri Insaaf*' in Sharda Cinema Theater, Khatima. At about 10:30P.M., appellant Iqbal Ahmad went inside the Cinema hall and asked Mohd. Saeed to come out. His friend appellant Mohd. Asif, meanwhile, stood outside. Mohd. Saeed followed Iqbal Ahmad and came out. Both the appellants Mohd. Asif and Iqbal Ahmad, thereafter started quarrelling with Mohd. Saeed. After some heated exchange of words, both the appellants Iqbal Ahmad and Mohd. Asif drew out their knives. Appellan Iqbal Ahmad caught hold of Mohd. Saeed and appellant Mohd. Asif struck a blow with knife on the back of the Mohd. Saeed (deceased). The incident was witnessed by P.W. 1, Kanhaiya Lal (a betel shopkeeper in the Sharda Cinema); P.W. 2, hem Raj (gatekeeper of the Cinema hall); P.W. 3, Shakeel Ahmad (a friend of the deceased who was watching movie with him). Soon after the incident, on hearing shouts for help, P.w. 4, Constable Bachche Singh and another Constable Bhisma Singh also reached at the spot. Appellant Mohd. Asif was apprehended at the spot while appellant Iqbal Ahmad succeeded in running away from the scene. P.W. 3, Shakeel and P.W. 4, Constable Bachche Singh took the injured Mohd. Saeed to nearby hospital and thereafter P.W. 3, Shakeel lodged the first information report (Ext. A -1) with the police station Khatima against both the appellants, which was registered as crime No. 55 of 1981 under Section 307 of the I.P.C. meanwhile, the dying declaration (Ext. A -14) of the deceased was recorded by P.W. 10, Javed Usmani, Sub

Divisional Magistrate, Khatima. Where after, injured Mohd. Saeed was referred from Primary health Center, Khatima for further medical treatment to Pilibhit. However, after four days of the incident, Mohd. Saeed died of the injuries sustained by him and the case was converted into one under Section 302 of the I.P.C. P.W. 8, S.I. Hari Shankar on receiving information of death of Mohd. Saeed went to the hospital and took the dead body in his possession and got prepared inquest report (Ext. A-9) and other papers namely photo sketch of the dead body (Ext. A-10), police form No. 13 (Ext. A-11), letter requesting for postmortem examination (Ext. A-12) and sent the dead body for postmortem examination. P.W. 11, Dr. A.K. Mehrotra conducted the postmortem examination of the dead body on 21.02.1981. According to the said Medical Officer cause of death was pulmonary embolism on the left side. He prepared the postmortem examination report (Ext. A-15). Initially, the investigation was done by P.W. 7, S.I. Radha Krishna Bahuguna and after the crime was converted to one under Section 302 of I.P.C. , further investigation was conducted by P.W. 5, Laxmi Ram Arya, Station House Officer. After the statements of witnesses were recorded and site plan (Ext. A-8) was prepared, charge sheet (Ext. A-3) against both the appellants, was submitted in the court by P.W. 5 (Investigating Officer). Concerned learned Magistrate after registering the charge sheet provided necessary copies, as required under Section 207 of the Cr.P.C., to the accused persons and committed the case to the court of Sessions for trial.

3) The learned Sessions Judge, after hearing the prosecution and the defence, framed charge of offence punishable under Section 302 of the I.P.C. against accused appellant Mohd. Asif and the one punishable under Section 302 read with Section 34 of the I.P.C. against appellant Iqbal Ahmad. Both of the accused appellants pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1, Kanhaiya Lal, eyewitness and betel shopkeeper in the cinema hall; P.W. 2, Hem Raj, eyewitness and gatekeeper of the Cinema hall; P.W.3, Shakeel, eyewitness and friend of the deceased who was watching movie with him; P.W. 4, Constable Bachche Singh, who reached at the spot soon after the incident and helped P.W. 3, Shakeel in apprehending appellant Mohd. Asif on the spot; P.W. 5, Constable Laxmi Ram Arya (Investigating Officer), who submitted the charge sheet; P.W. 6, Head Constable Trilok Chand, who registered the first information report (Ext. A -1) and prepared check report (Ext. A -4) and made entry in the general dairy (extract Ext. A -5); P.W. 7, R. K. Bahuguna, who initially investigated the crime; P.W. 8, S.I. Hari Shankar, who got prepared inquest report (Ext. A -9) of dead body and also witnessed the preparation of photo sketch of the dead body (Ext. A -10), police form No. 13 (Ext. A- 11), letter requesting for postmortem examination (Ext. A -12); P.W. 9, Dr. L.D. Khatri, who recorded the stab injury of Mohd. Saeed (deceased) when he was brought in an injured condition on 15.02.1981, at 11:00 P.M. in Primary Health Center, Khatima and who prepared injury report (Ext. A-13); P.W. 10, Javed Usmani, the then, Sub Divisional Magistrate, Khatima who recorded the dying declaration

(Ext. A –14), at about 11:30 P.M. on 15.02.1981; P.W. 11, Dr. A.K. Mehrotra, who conducted the autopsy and prepared postmortem examination report (Ext. A –15). Apart from this affidavit of P.W. 12, Constable Om Swaroop was filed, who accompanied the dead body to Mortuary for postmortem examination. The oral and documentary evidence was put to the accused persons under Section 313 of the Cr.p.C., in reply to which they alleged that the same was wrong and they have been falsely implicated, but they did not adduce any evidence in defence of their case. After hearing the arguments of prosecution and that of the defence, learned Sessions Judge found both the appellants guilty of the charge framed against them and convicted accused appellant Mohd. Asif under Section 302 of the I.P.C. and accused appellant Iqbal Ahmad under Section 302 read with Section 34 of the I.P.C., and after hearing on sentence, sentenced each of them to imprisonment for life.

4) Aggrieved by the judgment and order dated 08.10.1982, both the convicts have preferred this appeal. The appeal was initially filed before the Allahabad High Court in the year 1982 from where it was transferred to this Court under Section 35 of the U.P. Re-organization Act, 2000, for its disposal.

5) We heard learned counsel for the parties and perused the entire evidence on record.

6) Before further discussion, it is pertinent to mention here, the injury found on the person of Mohd. Saeed, soon after the incident, by P.W. 9, Dr. L.D. Khatri, at about

11:00 P.M. on 15.02.1981, in Primary Health Center, Khatima who recorded the injury report and prepared Ext. A –13, which discloses following injury:

> ***Stab would size of 2 cm X 1 cm depth, on the back of the chest left side lowermost part. Edges of the wound are sharp and clean cut. Both ends are pointed. Bleeding from the wound is profuse. Sub cutaneous tissue visible.***

According to Dr. L.D. Khatri (P.W. 9) the injury was fresh and caused by some sharp pointed object.

The injured Mohd. Saeed later died of the injuries. The ante mortem injuries found on the person of the deceased Mohd. Saeed and recorded in his postmortem examination report Ext. A –15 prepared by P.W. 11, Dr. A.K. Mehrotra on 21.02.1981, discloses following injuries:

i) ***Stitched wound 15 cm long, oblique 26 cm below the axillary pit left side, drainage put in.***
ii) ***Stitched wound 2 cm long in lumber region back of the left side of abdomen 5 cms from injury No.1.***
iii) ***Cut open wounds on both legs on medical mellows 1 cm X 0.5 X muscle deep.***

In the opinion of the Medical Officer, who conducted the postmortem examination the cause of death was pulmonary embolism on the left side. According to the aforesaid Medical Officer, it was quite possible that kidney of the deceased was ruptured due to aforesaid injury No. 2 and as a result of which pulmonary embolism was possible. He further opined that ante mortem injury was sufficient to cause death in the ordinary course of nature. In the opinion

of the Medical Officer, P.W. 11, Dr. A.K. Mehrotra, injuries No. 1 and 3 are possible because of the operation while the injured had undergone medical treatment in the hospital.

7) There are as many as three eyewitnesses of the incident who have narrated that appellant Mohd. Asif gave a knife blow to Mohd. Saeed from the back after his associate Iqbal Ahmad caught him. P.W. 1, Kanahaiya Lal, who runs a betel shop in Sharda Cinema hall, where the incident has taken place, is the natural and independent eyewitness who has narrated that on the day of incident, at about 10:30 P.M., appellants Asif and Iqbal visited the Cinema hall. Mohd. Asif stood out while Iqbal Ahmad went inside the hall and came with Mohd. Saeed. This witness further states that Mohd. Asif and Iqbal Ahmad quarreled with Mohd. Saeed. Asif shouted that he would not leave Saeed alive. This witness further states that while Iqbal Ahmad caught hold of Mohd. Saeed, Asif struck a knife blow on the person of Mohd. Saeed. P.W. 2, Hem Raj is gatekeeper of the Sharda Cinema hall, where the incident has taken place. This witness is also trustworthy and natural one. He too have narrated the prosecution story that on the day of incident, at about 10:30 P.M., Asif and Iqbal came in the Sharda Theatre and Iqbal went inside the Cinema hall to call out Mohd. Saeed. Soon thereafter, the two strated quarrelling with Mohd. Saeed and Iqbal caught hold of Saeed and Asif struck knife blow at Mohd. Saeed. This witness also corroborates like P.W. 1., Kanahaiya Lal that soon thereafter two policemen also reached at the spot. P.W. 3, Shakeel, the friend of the deceased who was

watching movie with him has stated that on 15.02.1981 both of them were watching a movie in Sharda Cinema hall. He further states that after 10:00 P.M., Iqbal Ahmad came inside the hall in the First Class and asked Mohd. Saeed to come out of the hall. Saeed followed him. After sometime this witness says he too came out of the hall and saw Mohd. Asif and Iqbal Amhad quarrelling with Mohd. Saeed. This witness also states that when Iqbal caught hold of Saeed, Mohd. Asif shouted that he would not leave Saeed alive and gave a knife blow to him. The witness further states that he shouted for help and two policemen rushed at the spot. P.W. 3, Shakeel further states that with the help of policemen he could apprehend appellant Mohd. Asif on the spot and policemen also snatched knife (Ext. 1) from the possession of Mohd. Asif. All the three eyewitnesses have stated that there was light of electric bulbs on the spot. P.W. 4, Constable Bachche Singh has also corroborated the fact that the electric light was there on the spot and he has further corroborated the fact that with the help of Shakeel, he along with Constable Bhisma Singh could apprehend Mohd. Asif, on the spot. This witness further states that knife (Ext. 1) was snatched from Asif at the spot, then and there, by him and his fellow Constable Bhisma Singh. The entire above narration is natural and trustworthy. There is no reason to doubt the truthfulness of the statements of the above witnesses.

8) The stab injury on the person of the deceased is corroborated by the medical evidence as mentioned above. Not only this, the knife (Ext. 1) recovered from the appellant Mohd. Asif at the spot further corroborates the

prosecution story. From all the facts and circumstances brought on record by the prosecution in the form of oral and documentary evidence as discussed above, the charge of commission of murder by appellant Mohd. Asif stands proved beyond all reasonable doubt.

9) On behalf of learned counsel for the appellant Mohd. Asif it is argued that the recovery memo of knife (Ext. A–2) does not bear signature of Mohd. Asif, as such, it cannot be said that the knife was recovered from appellant Mohd. Asif. We see little force in the argument advanced on behalf of the appellant for the reason that the recovery memo was not prepared at the spot. Rather, after Mohd. Asif was caught by P.W. 3., Shakeel with the help of policemen and the accused Mohd. Asif was taken by P.W. 3, Shakeel and P.W. 4, Constable Bachche Singh to the police station along with the knife recovered from him, the memo was prepared at the police station regarding the fact that the recovered knife was deposited with the police. As such, non-obtaining of signatures of Mohd. Asif in Ext. A –2 does not make any difference in the truthfulness of the prosecution story.

10) Mrs. Pushpa Joshi, learned counsel for the appellant Mohd. Asif contended that it is unnatural that Constable Bhisma Singh kept waiting in Cinema hall after apprehending appellant Mohd. Asif and did not leave the Cinema hall. Had he proceeded immediately to the police station the correct version of the incident could have been narrated at the earliest possible time. Again, we do not see any force in the contention of the learned counsel for the appellant as we have already discussed that Shakeel (P.W.

3), friend of the deceased had taken Mohd. Saeed to hospital for treatment. Constable Bachche Singh (P.W. 4) accompanied him leaving Constable Bhisma Singh with appellant Mohd. Asif in the Cinema hall. It is quite possible that had Bhisma Singh left the place of incident (Cinema hall) in the night, the apprehended appellant Mohd. Asif could have managed to flee on way to the police station. Any prudent policeman would take care that the culprit who is caught at the spot should not be given opportunity to flee on account of negligence on his part.

11) It is also submitted by the learned counsel for the appellant that Shakeel (P.W. 3) has not produced half torn ticket to establish his presence in the Cinema hall at the time of the occurrence. In view of the facts and circumstances of the case that since evidence of eyewitnesses, namely P.W. 1, Kanahaiya Lal, shopkeeper; P.W. 2, Hem Raj, gatekeeper of Cinema hall is on the record, mere non-production of half torn ticket by third eyewitness, P.W. 3, Shakeep does not create any reasonable doubt in the prosecution story. Lastly, it is also argued on behalf of the appellant that in dying declaration (Ext. A – 14) no enmity on the part of the appellants with the deceased is mentioned. We have examined the dying declaration, Ext. A –14. The dying declaration is so clear that even that document itself was sufficient to prove the charge against Mohd. Asif (appellant). Though it is mentioned in Ext. A –14 that there was no direct enmity of the deceased with the accused Mohd. Asif and accused Iqbal Ahmad but it is mentioned in it that about 3-4 days

before the date of incident, deceased and Mohd. Asif had some confrontation (AINTH BAAZI) between them.

12) In view of the above discussion, we do not see any error of law or that of the fact in the impugned judgment and order of the trial court in convicting and sentencing the appellants. Accordingly, the appeal is liable to be dismissed and the same is dismissed. The appellant Mohd. Asif is on bail. His bail bonds are cancelled. He shall be taken into custody by the court concerned so that he may serve out the sentence, awarded against him. As far as appellant No. 2 is concerned, since it is reported that he has died, the appeal filed by appellant No. 2, Iqbal Ahmad stands abated.

(Prafulla C. Pant, J.) (Rajeev Gupta, C.J.)

Dt. June 08, 2006.
H. Negi